United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1262

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

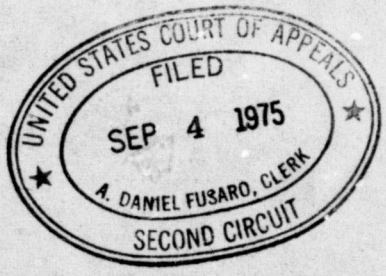
TOMMIE LEWIS BELL,

Appellant.

Docket No. 75-1262

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether there are any non-frivolous issues in this case to be raised for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) entered on June 30, 1975, revoking, after a hearing, appellant's probationary term and sentencing him to a term of imprisonment of one year.

This Court granted leave to appeal in forma pauperis and continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On July 28, 1971, appellant pleaded guilty to the charge of forging the endorsement of the payee of a United States Treasury check. On September 15, 1971, imposition of sentence was suspended and appellant was placed on probation for a period of three years.* Almost two years later, appellant's order of probation dated September 15, 1971, was revoked.** However, on June 15, 1973, sentence was again

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*See Document #6 to the record on appeal.

**Appellant admitted violating the terms of his probation as set forth in two of the five specifications of the Probation Department's petition. See Document #10 to the record on appeal.

suspended, and appellant was placed on a new term of probation for two years, subject to the standing probation order of the District Court.

On June 10, 1975, the Probation Department filed a petition* charging appellant with six specifications of violating the conditions of his probation: three assaults upon Carrie Middleton,** the failure to report to his probation officer;*** the failure to report an arrest to his probation officer; and the failure to notify his probation officer of unemployment.****

The Hearing

Carrie Middleton and appellant testified at appellant's probation revocation hearing. Middleton stated that she and appellant had been living together intermittently for eighteen months (18*****). She testified that in April 1974

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*See Document #12 to the record on appeal.

**Violations of State penal laws are prohibited by ¶1 of the General Conditions of Probation of the United States District Court for the Southern District of New York ("Standing Probation Order").

***¶9 of the Standing Probation Order states that a probationer "shall report at such times and places as the Probation Officer shall direct."

****¶4 of the Standing Probation Order states in part that a probationer "shall immediately notify the Probation Officer of any change in or cessation of employment."

*****Numerals in parentheses refer to pages of the minutes of the probation revocation hearing.

appellant beat her with a piece of wood; that in December 1974 appellant stopped a car in which she was riding and, as she left the car, appellant stabbed her (25); that on March 7, 1975, appellant kicked her and stabbed her in the thigh (26); and that she reported this assault to the police (28). A summons was issued in Rockland County charging appellant with the March 7 assault (97). Middleton also stated that appellant had assaulted her on June 8, 1975 (27), and that the assaults about which she testified were part of a continuous series of beatings by appellant (44).

Appellant testified that he had struck Middleton (76-77, 87) in April 1974 because she flattened the tires on appellant's car (76). Appellant denied ever stabbing Middleton (78), and stated that on March 7 Middleton cut herself on the hinge of a door while she and appellant were "tousling" (79). Appellant also testified about injuries inflicted on him by Middleton (74) and stated that on June 8, 1975, Middleton had attacked him with a razor (84-85).

Judge Frankel found appellant guilty as charged in the first three specifications of the Probation Department's petition (97, 99). In relation to specification one, involving the April 1974 assault, Judge Frankel said:

> I find on his own testimony, which I don't fully believe, but as it supports her, that he was correctly charged, by the clear and overwhelming evidence on specification #1.
>
> (103).

Specifications four and six were withdrawn by the Government (99), and the District Court dismissed specification five (97).*

Appellant was sentenced to a term of imprisonment of one year.

STATEMENT OF POSSIBLE LEGAL ISSUES

There is one possible legal issue to be raised on appeal.

Appellant's probation was revoked because Judge Frankel found that appellant had assaulted Middleton in April 1974, December 1974, and on March 7, 1975. Appellant had received a State summons charging him with the March 7 assault, but no further proceedings had occurred in the State court at the time of the probation revocation hearing. Thus, the potential appellate issue is whether appellant's probation may be revoked because of violations of State law for which he had not been convicted. However, in United States v. Markovich, 348 F.2d 238, 240 (2d Cir. 1965),** this Court stated:

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*The District Court's findings of fact are "C" to appellant's separate appendix.

**Markovich involved an individual who had been charged, but not tried, with theft.

> Probation may be revoked when the judge is satisfied that a state or federal law has been violated, and conviction is not a prerequisite.
>
> Id., 348 F.2d at 240.

Accord, Roberson v. State of Connecticut, 501 F.2d 305, 308 (2d Cir. 1974).

Although the record is unclear about whether the other assaults occurring in April 1974 and December 1974 had been reported to the police (28), or whether appellant had been charged in State proceedings with these assaults, the absence of these facts would not preclude the revocation of appellant's probation. United States v. Chambers, 429 F.2d 410, 411 (3d Cir. 1970);* Kirsch v. United States, 173 F.2d 652, 654 (8th Cir. 1949), cited approvingly in United States v. Markovich, supra, 348 F.2d at 240; Neely v. United States, 151 F.2d 533 (5th Cir. 1945), cited approvingly in United States v. Markovich, supra, 348 F.2d at 240; cf. United States v. Markovich, ibid.

Here Judge Frankel specifically found that appellant violated State law by assaulting Carrie Middleton. This finding was supported both by Middleton's and appellant's testimony at the hearing (23, 25, 26, 76-77), and is there-

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*In Chambers, probation had been revoked "in part upon a finding that appellant was guilty of the hit-run violation, a charge for which he was not prosecuted in state court." United States v. Chambers, supra, 429 F.2d at 411.

fore not clearly erroneous.*

Thus, it does not appear that the District Court abused its discretion by revoking appellant's probation. Roberson v. State of Connecticut, supra, 501 F.2d at 308; United States v. Nagelberg, 413 F.2d 708, 709-710 (2d Cir. 1969); United States v. Markovich, supra, 348 F.2d at 241.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues in this case to be raised for this Court's review. Accordingly, The Legal Aid Society, Federal Defender Services Unit, should be relieved as appellant's counsel on appeal.

Respectfully submitted,

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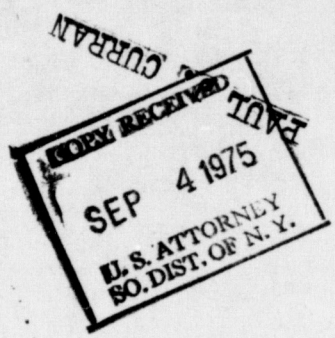
*Judge Frankel did not fully believe appellant's testimony (103) but accepted those portions of appellant's testimony which supported Middleton's version of the facts. As the factfinder here, it was the District Court's proper function to determine this issue of credibility. United States v. Nagelberg, 413 F.2d 708, 709 (2d Cir. 1969)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